

Letter of Findings: 04-20120536
Gross Retail Tax
For the Years 2009, 2010, and 2011

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ISSUES

I. Shipping to Out-of-State Locations – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-2.5-5-24(a)(2); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974).

Taxpayer argues it was not required to collect sales tax when it sold its customers printed materials which Taxpayer shipped directly to out-of-state locations.

II. Postage and Delivery Expenses – Gross Retail Tax.

Authority: IC § 6-2.5-1-5; IC § 6-8.1-5-1(c).

Taxpayer maintains it was not required to collect sales tax on postage and delivery costs when it charged its non-exempt customers for delivering printed materials.

III. Calculation Error – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c).

Taxpayer states that the audit made an entry error which overstated a the sales amount on a particular invoice.

IV. Exemption Certificates – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c); IC § 6-2.5-8-8(a).

Taxpayer states that it was not required to collect sales tax on transactions in which the purchasers provided exemption certificates.

STATEMENT OF FACTS

Taxpayer is an Indiana business which provides printing, fulfillment, mailing, and certain specialty business needs. The Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional sales and/or use tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Shipping to Out-of-State Locations – Gross Retail Tax.

DISCUSSION

Taxpayer sells printed materials to its customers. Taxpayer failed to collect sales tax on some of the transactions. The audit assessed tax. Taxpayer disagrees stating that some of the transactions are exempt from sales tax.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

Taxpayer states that certain of the transactions are exempt pursuant to IC § 6-2.5-5-24(a)(2) which states in relevant part:

(a) Transactions are exempt from the state gross retail tax to the extent that the gross retail income from those transactions is derived from gross receipts that are:

- (1) derived from sales to the United States government, to the extent the state is prohibited by the Constitution of the United States from taxing that gross income;
- (2) derived from commercial printing that results in printed materials, excluding the business of photocopying, that are shipped, mailed, or delivered outside Indiana; (Emphasis added).

In applying any tax exemption such as IC § 6-2.5-5-24(a)(2), the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). Therefore, a statute which provides a tax exemption is strictly construed against the taxpayer. Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." Id. at 101.

In addition to establishing that its transactions fall within a particular exemption, Taxpayer bears the burden of demonstrating that the proposed assessment is wrong. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer has provided copies of "job tickets" which purport to establish that certain of the transactions included in the audit report resulted in the delivery of printed materials directly to out-of-state locations as specified in IC § 6-2.5-5-24(a)(2). To the extent that the "job tickets" correspond to the invoices in which Taxpayer was assessed sales tax on the purchase of printed materials, Taxpayer's protest is sustained.

The Audit Division is requested to review the newly presented "job tickets" and to make whatever adjustments to the audit assessment as warranted.

FINDING

Taxpayer's protest is sustained subject to audit review.

II. Postage and Delivery Expenses – Gross Retail Tax.

DISCUSSION

The audit found that Taxpayer failed to collect sales tax on "shipping charges and delivery/postage charges" for non-exempt customers.

Taxpayer disagrees stating that it works through a third-party fulfillment service which arranges for the printed materials to be packaged and shipped, that it does not own or use a postage meter, and that Taxpayer packages and ships the printed materials as a convenience for its Indiana customers.

IC § 6-2.5-1-5 provides in part as follows:

Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges; or
- (5) consideration received by the seller from a third party if:
 - (A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
 - (B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
 - (C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
 - (D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing. (Emphasis added).

IC § 6-2.5-1-5 classifies as taxable "gross retail income" the entire amount a retail merchant charges for "delivery and installation." IC § 6-2.5-1-5 specifically states that the vendor includes all costs associated with "delivery and installation" including "shipping, postage, handling, crating, and packing."

Taxpayer charges its customers to deliver printed materials; the delivery charges are subject to sales tax and the law does not permit a deduction for the cost – separately stated or not – of the postage. Taxpayer has not met its burden under IC § 6-8.1-5-1(c) of establishing that the proposed assessment is wrong.

FINDING

To the extent that Taxpayer failed to collect sales tax from non-exempt customers, Taxpayer's protest is denied.

III. Calculation Error – Gross Retail Tax.

DISCUSSION

Taxpayer maintains that the Department made a transcription error recording the amount of taxable shipping charges on an invoice made out to a local bank. Taxpayer cites to an invoice 11031 which the audit report on page 13 indicates contains a shipping cost of \$1,314. Taxpayer provided a copy of original invoice number 11031 which indicates that shipping costs were \$13.17.

Taxpayer is correct. On its face, the audit report entry appears incorrect. Taxpayer has met its burden under IC § 6-8.1-5-1(c) sufficient to request that the audit division review the specific entry and make whatever adjustment is deemed appropriate.

FINDING

Subject to audit review, Taxpayer's protest is sustained.

IV. Exemption Certificates – Gross Retail Tax.

DISCUSSION

During the course of the administrative hearing, Taxpayer's representative explained that Taxpayer could provide exemption certificates for some of its customers. Taxpayer asked that the Department adjust the audit assessment to reflect the fact that it was not required to collect sales tax from the customers represented by the exemption certificates.

Taxpayer is correct that under certain circumstances, a retail merchant such as Taxpayer is not required to collect sales tax. Under IC § 6-2.5-8-8(a), "A person... who makes a purchase in a transaction which is exempt from the state gross retail tax and use taxes, may issue an exemption certificate to the seller instead of paying the tax." Once the purchaser provides the exemption certificate, the retail merchant is under no obligation to collect sales tax on the transaction. IC § 6-2.5-8-8(a) states that, "A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase."

Taxpayer has belatedly provided exemption certificates and other documentation purportedly relevant to some of the challenged assessments. However, the certificates and documentation are not contemporaneous to the transactions at issue. For example, Taxpayer supplied a Form ST-105 dated November 2012; however, the transactions at issue occurred prior to November 2012.

Taxpayer has not met its burden under IC § 6-8.1-5-1(c) of demonstrating that the original sales tax assessments were incorrect.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

To the extent that Taxpayer's job tickets establish that it shipped printed materials to out-of-state locations, Taxpayer's protest is sustained; the Audit Division is requested to review the Taxpayer's invoice 11031 and make whatever adjustment is justified; in all other respects, Taxpayer's protest is denied.

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